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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 783

JESSE MILLER SINCLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 18) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1949 (R. 19). The petition for a writ of certiorari was filed on May 12, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner is immune from prosecution under Section 211 of the Criminal Code on the ground that the letter upon which the prosecution is based was a privileged communication to his estranged wife.

2. Whether the mailing of the letter involved constituted a violation of Section 211 of the Criminal Code as charged in the indictment.

3. Whether the application of the statute in the circumstances of this case violated petitioner's rights under the First Amendment to the Constitution.

STATUTE INVOLVED

Section 211 of the Criminal Code, 18 U.S.C. [1946 ed.] 334 provided in pertinent part as of the date of the offense involved in this case:

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

On July 14, 1948, petitioner mailed a letter enclosed in an envelope addressed to his wife in her

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maiden name (R. 4, 9-10). The letter is reproduced at page 16 of the record. Petitioner and his wife had not been living together for several months (R. 6-7). His mother-in-law, with whom his wife was staying during this period, testified that her daughter and petitioner had no home and that he was visiting her week ends (R. 7). The letter in question was delivered to the mother-in-law's mail box by a postman on July 15, 1948 (R. 4). She took the letter from the mail box and gave it to her daughter, who opened it and read it in her presence (R. 4-5). The letter was thereafter turned over to the postal authorities (R. 8). On July 21, 1948, a post office inspector visited petitioner at the place where he was then living (R. 9) and petitioner admitted writing and mailing the letter, which he initialed in the inspector's presence (R. 9-10).

The indictment did not set out the letter *in haec verba,* but described it as "a certain obscene, lewd and lascivious letter and writing, which said letter and writing was enclosed in an envelope addressed and directed to Grace Somers, 234 West Summit, Haddonfield, New Jersey." The indictment also set forth the date and place of mailing and specified the statute violation of which was charged. (R. 2.) Petitioner waived a jury trial (R. 1), and he did not take the stand or offer any other evidence in his own behalf (R. 14). He was found guilty and sentenced to imprisonment for one year and a day (R. 17).

The Court of Appeals affirmed in a short *per curiam* opinion, stating that it had not been convinced that the conviction was not fully justified by the evidence or that any error had been committed (R. 18).

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the letter for the mailing of which he was convicted was a privileged confidential communication from husband to wife and could not, therefore, be used as a basis for this prosecution. In the first place, if we assume that the letter was privileged, the privilege is not absolute and is waived if not claimed. 8 Wigmore, *Evidence* (3rd Ed.), Sec. 2340; *Steen* v. *First National Bank,* 298 Fed. 36 (C.A. 8); *Clark* v. *United States,* 245 Fed. 112 (C.A. 9). Far from claiming the privilege by objecting to the admission of the letter, petitioner's counsel stated, when counsel for the Government offered it in evidence, "I do not believe I can make any objection to that" (R. 11). And so far as appears from the record, petitioner did not object at any other point in the trial proceedings that the letter was privileged. Having thus conceded that the letter was admissible, he is barred from seeking reversal therefor. *Proffitt* v. *United States,* 264 Fed. 299 (C.A. 9).

More fundamentally, however, we submit that the letter was not privileged. We think that, as with the general rule against competency of one spouse as a witness against the other, the excep-

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tion of "necessity," in cases involving injury to the witness-spouse, is applicable to communications between husband and wife (See *United States* v. *Mitchell*, 137 F. 2d 1006, 1009, reaffirmed, 138 F. 2d 831 (C.A. 2), certiorari denied, 321 U.S. 794). The overriding considerations of public policy underlying the exception operate as imperatively to deny the privilege as to support the competency of the injured spouse. See 8 Wigmore, Sec. 2338(4); American Law Institute, *Model Code of Evidence*, Rules 215, 216. Here, the mailing of the letter was itself the crime and petitioner's estranged wife was the victim of the offense. *United States* v. *Mitchell, supra*, 137 F. 2d at 1008. In such circumstances, we think petitioner's claim of privilege is unavailing. See *Spearman* v. *State*, 68 Tex. Cr. 449, 152 S.W. 915 (1913); *Beyerline* v. *State*, 147 Ind. 125, 45 N.E. 772 (1897); *Doolittle* v. *State*, 93 Ind. 272 (1883).

Moreover, petitioner had been living apart from his wife for several months (R. 6-7). That he visited her on week ends does not necessarily connote continuance of the marital status. It is consistent, as well, with efforts to repair a breach in that status, or on the other hand, to widen the breach into absolute divorce. It is clear from the fact that he wrote such a letter and addressed it to her in her maiden name (R. 4, 16) that there was a breach. "* * * the application of the privilege to a communication made between husband

and wife *living in separation,* * * * cannot be conceded." 8 Wigmore, Sec. 2335.

2. Whether, before its amendment in 1909 (see *United States* v. *Limehouse,* 285 U. S. 424, 426), Section 211 of the Criminal Code made punishable the mailing of such letter as is here involved, on the ground that it was "obscene, lewd, or lascivious" as those words were construed in *Swearingen* v. *United States,* 161 U. S. 446, is a question that is certainly not free from doubt. But the insertion of the words "and every filthy", in 1909, was prompted by a Congressional view that the Court, in the *Swearingen* case, had mistaken the original purpose of Congress,[1] and it is far from clear that a sharp line can be drawn between "filth" and "obscenity". These considerations may justify the conclusion that the failure to mention "filthy" in the indictment is of little significance since Congress originally intended that class of matter to be subsumed within the words "obscene, lewd and lascivious"—words which were used in the indictment (R. 2).

Even if the legislative addition of the words "and every filthy" is to be treated, generally, as creating "a new class of unmailable matter" *United States* v. *Limehouse,* 285 U. S. 424, 426, the failure to use those words in the indictment would not seem, under the circumstances of this

[1] 43 Cong. Rec. 284, statement of Mr. Moon, quoted at Pet. 8-9.

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case, to be prejudicial error. Petitioner does not now contend, nor has he ever contended, that this letter was not filthy (Pet. 10), and this Court's language in *Swearingen* and *Limehouse* would, indeed, appear to preclude such a contention.

It cannot be said that the indictment failed to apprise petitioner of the crime charged with such reasonable certainty that he could make his defense and protect himself after judgment against another prosecution for the same offense. *Rosen* v. *United States,* 161 U. S. 29, 40; *Price* v. *United States,* 165 U. S. 311; *Rinker* v. *United States,* 151 Fed. 755 (C. A. 8); *Timmons* v. *United States,* 85 Fed. 204 (C. A. 6). It positively identified the letter and specified the statute alleged to have been violated. This was sufficient. Rule 7(c), F. R. Crim. P.; *Koa Gora* v. *Territory of Hawaii,* 152 F. 2d 933 (C. A. 9), certiorari denied, 328 U. S. 862; cf. *Hagner* v. *United States,* 285 U. S. 427, 431; *Kramer* v. *United States,* 166 F. 2d 515, 519 (C. A. 9).

Assuming *arguendo,* then, that the letter was not obscene, lewd or lascivious, but merely filthy, the omission of the latter word from the indictment in characterizing the letter was harmless and should be disregarded. See *Hagner* v. *United States, supra; Koa Gora* v. *Territory of Hawaii, supra,* at 935; Rule 52(a), F. R. Crim. P. Had petitioner attacked the indictment, before trial, for failure to mention the word "filthy", a new indictment including the word could have been

obtained and the end result would have been the same.

Petitioner proffers no showing of prejudice and it is difficult to conceive of any. At the trial, petitioner's counsel said "I do not think there is anything to be said on the factual side." (R. 14). This would have been an equally accurate statement had the indictment contained the word "filthy".

3. Petitioner's attack (Pet. 12-14) upon the instant application of the statute as an invasion of his constitutional right of free speech guaranteed by the First Amendment seems baseless.

That there is no inconsistency between a statute barring obscene and other illegal matter from the mails and the First Amendment has long been settled. *Ex parte Jackson,* 96 U.S. 727; *In re Rapier,* 143 U.S. 110; *Public Clearing House* v. *Coyne,* 194 U.S. 497; *Donaldson* v. *Read Magazine,* 333 U.S. 178; *Coomer* v. *United States,* 213 Fed. 1 (C.A. 8); *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385 (C.A. 6); *Knowles* v. *United States,* 170 Fed. 409 (C.A. 8); *Harman* v. *United States,* 50 Fed. 921 (C.C.D. Kans.); cf. *Winters* v. *New York,* 333 U.S. 507. Obscenity and filth are themselves substantive evils, and penalties imposed for such language have never been tested in the "clear and present danger" terms applicable to utterances which embody the appeals to reason given the highest constitutional sanctity.

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CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1949.

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